

TENNESSEE REGULATORY AUTHORITY

DOCKET FILE COPY ORIGINAL

Melvin Malone, Chairman
Lynn Greer, Director
Sara Kyle, Director

460 James Robertson Parkway
Nashville, Tennessee 37243-0505

July 8, 1999

VIA FEDERAL EXPRESS

Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, DC 20554

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JUL 9 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket No. 98-92

Dear Ms. Salas:

Enclosed please find an original and twelve (12) copies of the Tennessee Regulatory Authority's Motion for Stay of Enforcement of Order and Memorandum of Federal Communications Commission of May 27, 1999 in the above styled matter. We attempted to make an electronic filing of this motion throughout the afternoon and evening yesterday without success. Please accept this filing in lieu of the attempted electronic filing.

Should you have any questions concerning this matter, please do not hesitate to contact me at (615) 741-3191 extension 170.

Very truly yours,

J. Richard Collier

J. Richard Collier, Esq.

Enclosure

cc: Val Sanford, Counsel for Hyperion
Dana Frix, Counsel for Hyperion
T.G. Pappas, Counsel for Tennessee Telephone Co.
Margot Smiley Humphrey, Counsel for TDS
Julie A. Barrie, Counsel for TDS
Kernal M. Hawa, Counsel for KMC Telecom, Inc.

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RECEIVED
JUL 9 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Petition for Preemption of Tennessee Code
Annotated § 65-4-201(d) and Tennessee Regulatory
Authority Decision Denying Hyperion’s Application
Requesting Authority to Provide Service in Tennessee
Rural LEC Service Areas**

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The Tennessee Regulatory Authority (the “Tennessee Authority” or “TRA”) files this Motion for Stay, pursuant to 47 C.F.R. §§ 1.102 and 1.106, of the Order and Memorandum issued by the Federal Communications Commission (the “Commission” or “FCC”) on May 27, 1999. The Tennessee Authority requests a stay of the enforcement of the Commission’s Order of May 27, 1999, until appropriate universal service mechanisms are implemented by the Commission and the Tennessee Authority. The TRA recognizes that a party seeking a stay must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors the grant of a stay.

The TRA believes that all of these factors are present in this case and all support the TRA's request for a stay.

In this action, the Commission has already entered an Order preempting the Tennessee Authority's enforcement of its April 9, 1998 Order and of Tenn. Code Ann. § 65-4-201(d). The Tennessee Authority has filed a Petition for Reconsideration asking the Commission to reconsider its decision that the Authority's Order and Tenn. Code Ann. § 65-4-201(d) do not fall within the protection of 47 U.S.C. Section 253 (b). The Authority's arguments as to why it should prevail on the merits of that Petition are set forth in the Petition and, in part, in this motion. The Authority believes that its request for reconsideration has strong merit because the FCC did not consider the full impact of its preemption decision under Section 253 nor the underlying purpose behind the protections set forth in Tenn. Code Ann. § 65-4-201(d). When the full impact of the FCC's decision on universal service, and consequently on the rural consumers, in the state of Tennessee is carefully considered, the FCC must reverse, or in the least clarify, its May 27th decision.

Further, the Authority asserts that irreparable harm could result if the stay is not granted and that the public interest necessitates the granting of a stay. The enforcement of the FCC's Order, without appropriate universal service mechanisms in place, will cause unreasonable increases in rates above current, affordable levels for consumers of Tennessee's rural telephone providers. Neither the FCC nor the Tennessee Regulatory Authority have implemented a universal service mechanism for rural carriers that reflects the changes in the marketplace as required by Section 254 of the Act. Tennessee intrastate high-cost support cannot be calculated until the amount of federal support is determined. For this reason, a Tennessee intrastate high cost fund has not yet been implemented.

In its First Report and Order in CC Docket 96-45, the Commission determined that “non-rural carriers would begin to receive high-cost support based on forward-looking costs on July 1, 1999, but that the implementation of support based on forward-looking costs for rural carriers would be delayed at least until January 1, 2001, pending further review by the Commission, the Joint Board, and a Joint Board-appointed Rural Task Force.”¹ The Commission later extended the implementation date for non-rural high cost support to January 1, 2000.²

Rural telephone companies in Tennessee generally rely on subsidies from a few large business customers to maintain affordable rates for all consumers, especially residential consumers. This is plainly demonstrated by TDS’s Tennessee operations.³ Business customers in the areas served by TDS affiliates make up only 12 % of the TDS’s total customer base, yet generate 46% of TDS’s local revenues. Preempting Tenn. Code Ann. §65-4-201(d) and allowing competitors access to the most profitable customers of rural carriers without appropriate universal service mechanisms in place, could unquestionably lead to “unreasonable increases in rates above current, affordable levels” for consumers of rural telephone companies in Tennessee.

The carrier of last resort obligations imposed on rural telephone companies in section 214(e)(4) imposes significant costs on rural carriers because much of their serving territories are in high cost areas providing potential competitors with distinctive “incremental cost advantages.” In addition, the State’s mechanism to allow carriers to

¹ *First Report and Order*, 12 FCC Rcd at 8910, para. 254; 8917-18, Paras. 252-56.

² Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket 96-45. Released May 28, 1999.

³ TDS affiliates in Tennessee include Tennessee Telephone, Concord Telephone, Tellico Telephone and Humphreys County Telephone.

rebalance rates to reflect the change in market conditions, Tenn. Code Ann. §65-5-207(c), is tied to the implementation of the intrastate universal service fund.⁴ Since rural carriers will not have the opportunity to rebalance rates to reflect changing market conditions until the intrastate high-cost fund is established, opening rural markets to competition as is being done through the FCC Order clearly places the rural incumbents at a competitive disadvantage.

Rates of rural incumbents in Tennessee are regulated under the rate of return approach. Tennessee statutes require the Authority to establish rates that provide these carriers with the opportunity to earn a just and reasonable rate of return. The FCC's Order of May 27, 1999 will result in new entrants, who have no obligation to serve, taking away or driving down the rates of the largest customers with no mechanism in place to preserve the lost revenues and maintain affordable rates for the remaining customers. The Authority will then have no choice but to allow irreparable increases to the remaining customers, perhaps to unaffordable levels in order to allow these rural carriers to earn a just and reasonable return on investment.

In adopting the telecommunications act, Congress included consumer safeguards such as universal service mechanisms to preserve affordable telephone service. The Tennessee General Assembly has adopted similar safeguards in Tenn. Code Ann. § 65-4-201(d). It is reasonable to conclude that in requiring competitive neutrality, Congress assumed that the universal service safeguards of section 254 would be in place to preserve affordable telephone service. Those safeguards are not in place at this time. The Commission's

⁴ Tenn. Code Ann. §65-5-207 requires a rebalancing of rates at the time the intrastate universal service mechanism is established.

decision to preempt the Tennessee Authority's Order of April 9, 1998 and Tenn. Code Ann. § 65-4-201(d) should be stayed until such safeguards are in place.

The Tennessee Authority asserts that Hyperion would not be harmed as a result of a stay. Further, should Hyperion allege that it would suffer harm, such is greatly outweighed by the public interest that necessitates the granting of a stay.

WHEREFORE, for the foregoing reasons, the Tennessee Regulatory Authority respectfully request that the Federal Communications Commission stay the enforcement of its Order of May 27, 1999 until federal and state universal service mechanisms are in place for rural carriers.

Respectfully submitted,

A handwritten signature in cursive script that reads "J. Richard Collier". The signature is written in dark ink and is positioned above a horizontal line.

J. Richard Collier, General Counsel
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 1999, the original of this Motion for Stay was filed via overnight delivery with the Federal Communications Commission and a true and exact copy of the foregoing has been either hand-delivered or delivered via U.S. Mail, postage pre-paid, to the following persons:

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